Supreme Court, U.S.
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No. 01-768

IN THE

Supreme Court of the United States

BURLINGTON AIR EXPRESS, INC.,
Petitioner,

v.

LITE-ON PERIPHERALS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK J. ANDREWS *
STRASBURGER & PRICE, LLP
1101 Pennsylvania Avenue, NW
Seventh Floor
Washington, DC 20004-2514
(202) 756-3629

* Counsel of Record

Attorneys for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Having issued a "Negotiable Combined Transport Bill of Lading" which encompassed both maritime and inland transportation of a shipment moving in the foreign commerce of the United States, how can petitioner possibly disclaim the federal subject-matter jurisdiction that was expressly admitted in its answer below?

2. May a carrier resort to state laws governing title to goods as a means of avoiding its self-assumed, self-drafted, contractual obligation to deliver an international shipment only upon surrender of a duly endorsed bill of lading?

3. When a carrier drafts its own bill of lading so as to designate the consignor of goods as a "Merchant" and a party to the bill, may the carrier resort to a pricing agreement with another party as a means of disavowing its contractual obligations to the consignor?

4. Did the Court of Appeals do anything more remarkable or adventuresome than merely holding a carrier to its own contractual obligation with respect to maritime and inland transportation of an international shipment, thus applying settled law in an unquestioned zone of federal supremacy?

STATEMENT PURSUANT TO RULE 29.6

Respondent Lite-On Peripherals, Inc. is a wholly-owned subsidiary of Silitek Corporation, which is a publicly traded company organized under the laws of the Republic of China (Taiwan).

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

For the reasons stated in this brief, respondent Lite-On Peripherals, Inc. respectfully submits that the petition should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Because the Court of Appeals correctly characterized this as a "straightforward contract case," *see* Appendix A to petition, Pet.App. 5, this Court may disregard most of the multitude of constitutional and statutory provisions cited and reproduced in the petition. Of all those provisions, only four have any pertinence here. All of these are reprinted in Appendix F to the petition, Pet.App. 26-27. The first is the Commerce Clause, under which "[t]he Congress shall have power . . . to regulate Commerce with foreign Nations. . ."

U.S.CONST. art. I, § 8. The second is the Admiralty Grant, under which "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S.CONST. art. III, § 2, cl. 1. The third and fourth are 28 U.S.C. §§ 1331 and 1337, which respectively give the federal district courts original jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States" and of "any civil action or proceeding arising under any Act of Congress regulating commerce [subject to certain jurisdictional threshold amounts not at issue here]." For reasons to be stated in this brief, the California statutory provisions quoted at length in the petition are irrelevant to this case.

Petitioner's answer to the complaint in the district court admitted federal jurisdiction under 28 U.S.C. § 1337. Although not discussed by either party below, 28 U.S.C. § 1333 (relating to maritime and admiralty cases) appears to provide a further basis for federal subject-matter jurisdiction, in view of petitioner's admitted status as an ocean transportation intermediary (Pet. 2) and in view of the fact that the shipment at issue moved primarily on an oceangoing vessel. *See* Part 1 of Argument *infra*.

STATEMENT OF THE CASE

1. The Statement of the Case by Petitioner Burlington Air Express, Inc. (renamed BAX Global Inc. during the pendency of this litigation) is replete with incorrect statements and characterizations of the facts, issues, pleadings and judicial decisions in this case. Contrary to petitioner's assertion (Pet. 2), this case is not about "whether respondent had title" to certain computer keyboards shipped from Taiwan to California. Instead, as the Court of Appeals recognized, this is a "straightforward contract case" arising from petitioner's failure to comply with a surrender-on-delivery clause in the bill of lading *drafted by petitioner itself* (Pet.App. 5). Under

that clause, petitioner had agreed that "the keyboards would not be turned over to the named consignee . . . unless the consignee produced an endorsed bill of lading" (Pet.App. 5).

2. Respondent initiated the civil action below as assignee of the rights of its Taiwanese parent company, Silitek Corporation ("Silitek"), which was the consignor named in the bill of lading for the keyboards. Respondent sued petitioner in the United States District Court for the Central District of California, invoking federal subject-matter jurisdiction over this shipment of goods in foreign commerce. The complaint alleged breach of contract, misdelivery of goods, negligence and conversion. It further stated that petitioner's failure to abide by the surrender-on-delivery clause in its own bill of lading had resulted in a loss of over $100,000 because the consignee failed to pay Silitek for the keyboards improperly delivered by petitioner. While petitioner's answer denied liability, *it expressly admitted the existence of subject-matter jurisdiction in federal court.*

3. In connection with receiving the shipment at issue in January 1996, petitioner issued a bill of lading under its "Burlington Ocean Services" trade name, utilizing its own standard-form Negotiable Combined Transport Bill of Lading. The bill of lading (reproduced in Appendix A to this brief) showed that the shipment consisted of 1,000 cartons containing 5,000 keyboards consigned from Silitek in Keelung, Taiwan and consigned to Reveal Computer Products ("Reveal") in Chatsworth, California. According to information typed on the front of the bill, the shipment moved on an oceangoing vessel known as the Ming Plenty from Taiwan to the Port of Los Angeles. Final delivery presumably was accomplished by truck to Chatsworth, an inland section of the city of Los Angeles some 40 freeway miles northwest of the port.

4. The plain words of the surrender-on-delivery clause on the front of petitioner's bill of lading read as follows:

> One of these Combined Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods.

Despite the presence of this language on the face of its own bill, petitioner admittedly delivered the entire shipment of keyboards to Reveal in February 1996 without obtaining a copy of the bill, endorsed or otherwise. *See* paragraph 7, *infra* and Pet.App. 4.

5. As recounted by the Court of Appeals, Reveal failed to pay Silitek or respondent for the keyboards. Respondent eventually was able to recover approximately half of the 5,000 keyboards. The value of the keyboards that could not be recovered came to $101,602.80. With Reveal ultimately having sought protection under the bankruptcy laws, this amount stands as Silitek's and respondent's loss resulting from petitioner's misdelivery. Pet.App. 4.

6. Based on the foregoing facts and circumstances, and after full briefing on cross-motions for summary judgment, the district court granted summary judgment in favor of respondent for $101,620.80 plus interest and costs. The Court of Appeals affirmed in a published opinion reproduced at Pet.App. 1-13. Petitioner sought certiorari after its petitions for rehearing and rehearing en banc were denied by the Court of Appeals. Pet.App. 24-25.

7. *At no time has petitioner denied that it failed to comply with the surrender-on-delivery clause of its own bill of lading.* In fact, petitioner *expressly admitted its non-compliance* in its Statement of Genuine Issues in Opposition to Plaintiff's Motion for Summary Judgment filed with the district court. In that document, petitioner was required to respond to each of the statements of fact in respondent's motion, including numbered items 5, 7 and 8 (asserting respectively that petitioner issued a bill of lading, that the bill contained a

surrender-on-delivery clause, and that petitioner nonetheless delivered to Reveal without obtaining the bill). As to each of these numbered items, petitioner's response was "Admitted."

8. Petitioner has tried to excuse its admitted noncompliance with the surrender-on-delivery clause on grounds that title to the goods passed to Reveal at origin (Pet. 8-26), and that petitioner's only contractual obligations were to Reveal under a separate "Rate and Service Agreement" with that entity (Pet. 5). Most recently, petitioner has even tried to back away from its threshold admission that the district court had subject-matter jurisdiction (Pet. 2, 26-29). Each of these diversionary arguments must be rejected.

9. Contrary to petitioner's repeated assertions before this Court and below, this case does not in any way concern a claim or issue of title. At no time during the pendency of this action did respondent ever assert title to the goods on behalf of itself or Silitek, nor claim that the goods should be delivered to respondent or redelivered to Silitek, nor even claim that respondent was a party to the bill of lading. To the contrary, all that respondent ever sought to do was to *prevent* the goods from being turned over to Reveal in violation of the surrender-on-delivery clause. Moreover, respondent at all times made clear that it takes its right of recovery not under any title theory, but through an assignment of a chose in action from Silitek, the consignor named on the bill of lading.

10. Nor is there any substance to petitioner's argument (apparently pressed with more vigor before the Court of Appeals than here, *see* Pet.App.6-10) that its only pertinent contractual relationship was with Reveal under a Rate and Service Agreement executed in May 1995. While that agreement contains no surrender-on-delivery clause, the record resoundingly refutes any claim that this was the sole or

paramount contractual relationship with regard to the shipment at issue. This is true for at least the following three reasons:

First, as the Court of Appeals observed (Pet.App. 7-8), petitioner cannot deny the contractual nature of its own bill of lading, which does contain the surrender-on-delivery clause. The text of the bill clearly imposes a detailed series of contractual obligations on both petitioner and a group of parties collectively labeled as the "Merchant," and also *defines the latter term to include the consignor.* Although the record below contains only imperfect reproductions of the bill of lading, the copy reproduced and enlarged in Appendix A to this brief will permit the Court to satisfy itself as to the correctness of the Court of Appeals' observations. *See, e.g.,* "DEFINITIONS" section and obligations assumed by "Merchant" under clauses 3.1, 4.1, 5.2, 13, 14.4 and 14.5 of the "CONDITIONS."

Second, Petitioner has identified no clause in its bill of lading that would incorporate an extraneous Rate and Service Agreement into the bill, much less subordinate the bill to such an agreement. Nor has petitioner suggested that Silitek or respondent had actual knowledge of the existence or terms of any agreement between petitioner and Reveal, much less that they consented to be bound by such an agreement.

Third, the text of the Rate and Service Agreement itself refutes petitioner's claim that this instrument was paramount. The record below contains an excellent copy of the Rate and Service Agreement, which is reproduced for the Court's convenience in Appendix B to this brief. The Court's attention is invited to the dispositive language of paragraph 10 in Appendix B (emphasis supplied):

> For other points not contained herein in tendering freight to Burlington Air Express, Reveal Computer

> Products agrees to be bound to the terms and conditions in Burlington's airbill, *ocean bill of lading,* tariffs and service guide.

Because the Rate and Service Agreement self-evidently contains no language addressing the delivery obligations of any party, resort must be had to the bill of lading which does contain such language. The bill of lading takes precedence as to delivery obligations; it does contain a surrender-on-delivery clause; and it is binding on and enforceable by all parties to the shipment, not just petitioner and Reveal.

11. Finally, petitioner's latter-day challenge to federal subject-matter jurisdiction over this case is incomprehensible. The case patently turns on the interpretation of a contract for maritime and inland transportation in the foreign commerce of the United States. As the Argument in this brief will demonstrate, it is beyond doubt that such matters are within the purview of federal courts.

ARGUMENT

I. THE DECISION BELOW REFLECTS A PERFECTLY ORDINARY EXERCISE OF FEDERAL JURISDICTION OVER FOREIGN COMMERCE

As pointed out *supra*, petitioner admitted in its answer below that federal subject-matter jurisdiction existed under 28 U.S.C. § 1337, relating to actions arising under "any Act of Congress regulating commerce." Furthermore, petitioner apparently admits that the Carriage of Goods By Sea Act, 46 U.S.C. app. §§ 1300-1315 ("COGSA") applied to at least the maritime portion of the transportation involved here (Pet. 8-9). Petitioner thus should not be heard to make an eleventh-hour suggestion, as it does at Pet. 26-29, that there is no federal subject-matter jurisdiction over this case.

Wholly aside from the applicability of 28 U.S.C. §§ 1331 and 1337, it is apparent that subject-matter jurisdiction exists under the "admiralty or maritime" provisions of 28 U.S.C.

§ 1333. A suit "lies within [the federal courts'] admiralty jurisdiction" and "is governed by federal maritime law" when it "involves claims by a shipper against an ocean carrier arising from an alleged breach of a contract of carriage." *Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 481 (2d Cir. 1985), *cert. denied* 475 U.S. 1099 (1986) (citing *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 807 (2d Cir. 1971) and *David Crystal, Inc. v. Cunard S.S. Co.*, 339 F.2d 295, 298 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965)). In other words, a "shipment of goods by sea" is precisely "the sort of traditional maritime activity which falls squarely within the district court's admiralty jurisdiction." *Genetics Int'l v. Cormorant Bulk Carriers, Inc.*, 877 F.2d 806, 808 (9th Cir. 1989) (citing 1 *Benedict on Admiralty*, §§ 181, 182 p. 12-4 (7th ed. 1989)). *See also J.B. Effenson Co. v. Three Bays Corp.*, 238 F.2d 611, 615 (5th Cir. 1956).

In this case, respondent's assignor is a shipper (Silitek) claiming breach of a contract of carriage involving shipment of goods by sea.[1] It is immaterial that petitioner did not directly operate the oceangoing vessel which carried the computer keyboards (Pet. 2). As an "ocean transportation intermediary" (Pet. 2) which issued a bill of lading for the keyboards, petitioner acted in the capacity of a non-vessel-operating common carrier or NVOCC within the meaning of 46 U.S.C. app. § 1702(17)(B). "Generally, an NVOCC combines the goods of various shippers into a single shipment, contracts with the vessel for the transportation of the goods, and delivers the goods to the vessel, usually in a sealed container." *All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1429 (9th Cir. 1993) *cert. denied* 510 U.S.

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[1] As the assignee of an assignable chose in action, respondent took legal title and was permitted to sue in its own name even without a beneficial interest. 4 Witkin, Cal. Procedure (9th ed. 1997) Pleadings, §§ 108-09, pp. 168-69.

1194 (1994) (citing *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 496 n.8 (1980)). An NVOCC "is considered a carrier in its relationship with the shipper of the goods." *All Pacific Trading*, 7 F.3d at 1430 (citing *National Customs Brokers & Forwarders Ass'n v. United States*, 883 F.2d 93, 101 (D.C. Cir. 1989)). *See also M. Prusman Ltd. v. M/V Nathanel*, 670 F.Supp. 1141, 1143 (S.D.N.Y. 1987) (NVOCC is a "carrier" for purposes of the cargo liability provisions of COGSA).

Given petitioner's obvious involvement in "traditional maritime activity which falls squarely within the district court's admiralty jurisdiction," petitioner's claim that the lower courts somehow usurped State authority in this case is puzzling in the extreme. While it is self-evident that completing the delivery to Reveal required a few miles of inland transportation as well as thousands of miles of maritime transportation, it does not follow (as suggested at Pet. 9) that State law suddenly became paramount the minute this shipment of keyboards in foreign commerce was "discharged from the ship." Because the bill of lading defined petitioner's service obligations for "combined transport" on a door-to-door basis, *i.e.*, for a continuous international journey from Taiwan to Chatsworth, the surrender-on-delivery clause continued to apply after offloading from the vessel.

Moreover, resort to inland transportation law would not aid petitioner's efforts to deploy State title-to-goods statutes as a shield against its obligations under the bill of lading. Assuming final delivery by truck, the preemption provisions of 49 U.S.C. § 14501(c) would preclude enforcement of any State law "related to a price, route or service" of the motor carrier. In construing virtually identical preemption language applicable to airlines, *see* 49 U.S.C. § 41713(b), this Court has held that States are precluded from "enlargement or enhancement" of price, route or service contracts between carriers and their customers through imposition of "state

laws or policies external to the agreement." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995). The result sought by petitioner here would enlarge the rights of Reveal, and diminish those of Silitek and respondent, through imposition of State policies that are not only external to, but repugnant to, the "privately ordered obligations," *Wolens* at 228, appearing in the surrender-on-delivery clause of the bill of lading.

II. TITLE TO THE GOODS WAS IRRELEVANT TO PETITIONER'S OBLIGATION UNDER THE SURRENDER-ON-DELIVERY CLAUSE

It is simply beyond question that a maritime or inland carrier is liable for misdelivery or conversion when it delivers goods in violation of a surrender-on-delivery clause in the bill of lading, and such delivery results in loss to the shipper as it did here. *Pere Marquette Ry. Co. v. J.F. French & Co.*, 254 U.S. 538, 546 (1921); *Iowa Beef Processors, Inc. v. Grand Trunk Western R. Co.*, 493 F.2d 665 (6th Cir. 1974); *Allied Chemical International Corp.*, 775 F.2d at 478-79, 481-82; *C-ART, Ltd. v. Hong Kong Islands Line America, S.A.*, 940 F.2d 530, 533 (9th Cir. 1991), *cert. denied* 503 U.S. 1005 (1992). The Second Circuit in *Allied Chemical* compellingly explained the reason for this rule (775 F.2d at 481-482):

> The liability question in this case inextricably involves the critical importance of the documentary transaction in overseas trade. *See generally* G. Gilmore & C. Black, The Law of Admiralty 110-12 (2d ed. 1975). The documentary sale enables the distant seller to protect himself from an insolvent or fraudulent foreign buyer by ensuring that the buyer ordinarily cannot take possession of the goods until he has paid for them. It accomplishes this rather simply. The seller tenders shipping documents, including a negotiable bill of lading, rather than goods to the buyer. By paying for the documents, the buyer gets possession of the original bill of lading. * * *

> Absent a valid agreement to the contrary, the carrier, the issuer of the bill of lading, is responsible for releasing the cargo only to the party who presents the original bill of lading. "Delivery to the consignee named in the bill of lading does not suffice to discharge the [carrier] where the consignee does not hold the bill of lading." 2 T.G. Carver, Carriage by Sea para. 1593 (R. Colinvaux 13th ed. 1982). * * *
>
> The dispute herein involved precisely the consequence that the documentary transaction is intended to avert: [a consignee], which turned out to be an insolvent buyer, was given possession of goods for which it had not paid.

Petitioner makes much of the fact that the terms of sale of the computer keyboards in this case apparently called for title to pass at origin. Here, however, just as in *C-ART,* "[t]his argument is inimical to the express provisions of the bill of lading, as well as contrary to the applicable authorities." 940 F.2d at 533. *See also International Knitwear Co. v. M/V Zim Canada*, 1994 U.S. Dist. LEXIS 14180, 1997 A.M.C. 1290 (S.D.N.Y. 1994) and *Datas Indus. Ltd. v. OEC Freight (HK) Ltd.*, 2000 U.S. Dist. LEXIS 15589 (S.D.N.Y. Oct. 20, 2000), both of which enforced surrender-on-delivery clauses despite contentions that some or all of the involved bills of lading were straight bills, *i.e.* non-negotiable documents incapable of conveying title.

As drafted by petitioner in its own bill of lading, the surrender-on-delivery clause is unqualified by any conditions addressing sales terms for, or title to, the goods being transported. It is well-established that "ocean bills of lading are contracts of adhesion and, as such, are strictly construed against the carrier." *Allied Chemical International,* 775 F.2d at 482 (citing *The Caledonia*, 157 U.S. 124, 137 (1895); *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 116 (2d Cir. 1931) (L. Hand, J.); *Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807, 822-23 (2d Cir. 1981), and *West India Indus, Inc. v. Tradex*, 664 F.2d 946, 951 n.9 (5th Cir. 1981)).

Moreover, there is no sound reason in law or policy for reading title-to-goods provisos into the plain language of the surrender-on-delivery clause. While the record does not indicate why Silitek entered into such risky sales terms with Reveal, the existence of such terms obviously makes enforcement of the surrender-on-delivery clause more important than ever as a last line of defense for a shipper who wants to be paid for the goods. While the surrender-on-delivery clause may have the effect of delaying or even preventing delivery to a party claiming title to the goods, this is not an unusual situation in the realm of transportation law. Common examples include general average (the doctrine allowing sacrifice of a portion of a ship's cargo in order to save the rest under emergency circumstances, *see Ralli v. Troop*, 157 U.S. 386 (1895)) and a carrier's common-law, contractual or statutory lien on goods to secure payment of its freight charges (*see, e.g.*, clause 15 of the bill of lading here, as reproduced in Appendix A). If petitioner had not been paid for its transportation services here, presumably it would have exercised its lien without ostentatious agonizing over who had title to the goods.

It bears repeating that neither respondent nor Silitek ever asked petitioner to deliver the goods to them. They asked only that petitioner honor the surrender-on-delivery clause by *not* delivering to Reveal unless and until that entity could produce the bill of lading as evidence that it had paid for the goods. Petitioner has inundated this Court with historical exegesis about the importance of uniformity in commercial law (as if the federal maritime and commerce jurisdiction did not already promote such uniformity), and has furnished statistics showing generally that a whole lot of containerized cargo moves through East Coast and West Coast ports (Pet. 15-19). The Court should give no credence, however, to petitioner's implication that adherence by carriers to surrender-on-delivery clauses would reduce the Nation's commerce to a chaotic shambles. As a familiar fact of com-

mercial life, delivery problems commonly are anticipated and dealt with in the bill of lading itself. Under clause 12 of the bill of lading here, for example, petitioner could and should have notified respondent or Silitek to request further instructions when Reveal could not produce the bill. The provision making the "Merchant" (including the consignor) liable for storage charges upon failure of delivery would have given Silitek and respondent every incentive to press Reveal for payment or otherwise to resolve the situation. *See* Appendix A.

Contrary to petitioner's contention, the outcome of this case would be commercially intolerable only if carriers could take it upon themselves to sit as kangaroo courts of title, choosing to enforce or disregard surrender-on-delivery clauses depending on their own notions as to what the sales and credit terms might be for the goods being transported. Consequently, the strict enforcement of the surrender-on-delivery clause by the district court and the Court of Appeals in this case represents sound policy as well as good law.

In a further effort to avoid enforcement of the surrender-on-delivery clause, petitioner claims that "[o]nly the 'holder' of a negotiable bill may enforce the bill as a contract" (Pet. 11 n.1). The decision it cites, however, stands only for the proposition that holders are *among* the parties who may seek such enforcement, and contains no language that would preclude *other* parties to the bill from enforcing it. *See Oliver Straw Goods Corp. v. Osaka Shosen Kaisha*, 47 F.2d 878, 879 (2d Cir.), *cert. denied*, 283 U.S. 856 (1931). By the plain words of the bill of lading here (Appendix A), the parties entitled to enforce it included all entities encompassed by the term "Merchant," and one such entity was Silitek (the consignor and respondent's assignor). *See All Pacific Trading*, 7 F.3d at 1432 (according party status to all entities included in similar bill-of-lading definition of "Merchant").

III. THE RATE AND SERVICE AGREEMENT BETWEEN PETITIONER AND THE BANKRUPT CONSIGNEE WAS IRRELEVANT TO PETITIONER'S OBLIGATION UNDER THE SURRENDER-ON-DELIVERY CLAUSE

Petitioner continues to insist that the sole or primary contract under which it transported the keyboards was not the bill of lading, but rather its "long-term rate and service agreement with Reveal" (Pet. 2-3). That position is untenable in view of three points already demonstrated by this brief. First, the Rate and Service Agreement (*see* Appendix B) ran only between petitioner and Reveal, whereas the bill of lading accorded party status to all entities with an interest in the shipment. Second, the Rate and Service Agreement was silent as to the delivery responsibilities of petitioner, whereas the bill of lading included a surrender-on-delivery clause. Third, as to all issues not covered in the Rate and Service Agreement (including delivery responsibilities), paragraph 10 of that instrument expressly made it *subordinate to petitioner's bill of lading.*

An early decision of this Court suggests that "the bill of lading alone can be considered as the contract" for an ocean shipment. *See The Caledonia,* 157 U.S. at 139. Today's Court, however, need not go so far in order to recognize that the bill of lading defines petitioner's obligations insofar as delivery is concerned. In particular, petitioner cannot bring itself within the circumstances under which lower courts in recent years have allowed maritime bills of lading to be modified or supplemented by other documents. The case presented here is precisely the opposite of *Hellenic Lines, Ltd. v. United States*, 512 F.2d 1196 (2d Cir. 1975), in which the *bill of lading* was silent on the pertinent issue and other documents filled the gap. 512 F.2d at 1207-08. Similarly inapposite are cases such as *Hellenic Lines, Ltd. v. Embassy of Pakistan*, 467 F.2d 1150 (2d Cir. 1972), in which the *bill of lading* contained language subordinating it to other docu-

ments, 467 F.2d at 1155, and *Hellenic Lines, Ltd. v. Director General of India Supply Mission*, 452 F.2d 810 (2d Cir. 1971), in which the other document (a contract of affreightment) contained explicit language relegating bills of lading to a subordinate position, 452 F.2d at 814.

Rather, this case is more like *International Drilling Co. v. The M/V Doriefs*, 291 F.Supp. 479 (S.D. Tex. 1968). There, the contract of affreightment (like the rate and service agreement here) contained language subordinating it to the bill of lading. *International Drilling*, 291 F.Supp. at 482. Consequently, the affreightment contract was enforceable only between the parties who executed it (which did not include the ship). *Id.* at 483-484. To similar effect is *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 523 F.2d 527 (2d Cir. 1975), *cert. denied* 423 U.S. 1054 (1976). There an arbitration clause appeared in the charter party, but not in the "fixture telex" which was held to be the paramount agreement on the facts of that case. Because the guarantor was not a party to the inferior document which contained the arbitration clause, the Second Circuit held that the guarantor must be excluded from the order compelling arbitration. *Interocean Shipping*, 523 F.2d at 534, 537-539.

So it is here, where the inferior document is the Rate and Service Agreement. While petitioner may be able to enforce that agreement as against Reveal (depending on the course and outcome of Reveal's bankruptcy case), this does not affect the status of the bill of lading as the paramount document binding all the parties to the shipment here. Thus, the surrender-on-delivery clause in the bill of lading was enforceable against petitioner by respondent (as assignee of consignor Silitek) regardless of the rights of petitioner and Reveal under their Rate and Service Agreement. The district court properly so found, and properly was affirmed by the Court of Appeals. There is no discernible reason for this Court to disturb the outcome below.

CONCLUSION

Reduced to its essence, the petition amounts to a facile but failed effort to dilute petitioner's plain and simple legal obligations under the surrender-on-delivery clause by resort to "situation ethics."[2] For all the reasons set forth in this brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK J. ANDREWS *
STRASBURGER & PRICE, LLP
1101 Pennsylvania Avenue, NW
Seventh Floor
Washington, DC 20004-2514
(202) 756-3629

* Counsel of Record

Attorneys for Respondent

[2] J. Fletcher, Situation Ethics: The New Morality (Philadelphia: Westminster Press, 1966).